

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	CC Docket No. 97-158
Southwestern Bell Telephone Company)	
)	Transmittal No. 2633
Tariff F.C.C. No. 73)	
)	
)	

**ORDER CONCLUDING INVESTIGATION
AND DENYING APPLICATION FOR REVIEW**

Adopted: November 14, 1997; Released: November 14, 1997

By the Commission: Commissioner Furchtgott-Roth concurring and issuing a statement;
Commissioner Powell issuing a statement.

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I. INTRODUCTION

1. By this Order, we conclude our investigation of Southwestern Bell Telephone Company's (SWBT's) Transmittal No. 2633, in which SWBT seeks permission to add to its interstate access tariff a new Section 29, "Request for Proposal (RFP)," in which SWBT would include its "response[s] to customer requests for proposal submitted to SWBT in competitive bid situations."¹ Under this Transmittal, SWBT seeks permission to offer access services in response to RFPs at rates below its other tariffed rates for those services. The Transmittal states that these lower rates would be available to "any similarly situated customer that submits a RFP requesting the same service in the same quantities and at the same central office(s)."² Under current Commission policies, we now reject Transmittal No. 2633 as violative of section 202(a) of the Communications Act of 1934, as amended (Act), and various specific Commission rules.³ Based on the record here, we find the competitive necessity doctrine inapplicable because of the potential for market foreclosure created by Transmittal No. 2633. We also note that we are considering in the *Access Charge Reform* rulemaking proceeding issues related to pricing flexibility for incumbent local exchange carriers (LECs) with the advent of competition in the local access and exchange access markets.

2. The Common Carrier Bureau's (Bureau's) Competitive Pricing Division commenced this investigation on June 13 when it suspended this tariff for five months from its effective date of June 15, 1997.⁴ The Division concluded that Transmittal No. 2633 raised significant questions of lawfulness, specifically with respect to the Commission's rules prohibiting dominant LECs from offering: (1) individual case basis (ICB) tariffs for other than new services;⁵ (2) contract tariffs; and (3) deaveraged access rates. Although SWBT recognizes its transmittal may conflict with at least some of these rules, it claims Transmittal

¹ Southwestern Bell Telephone Company Tariff F.C.C. No. 73, Transmittal No. 2633 (Transmittal No. 2633), Proposed Section 29.1.

² *Id.* at Section 29.2.

³ 47 U.S.C. § 202(a). See 47 C.F.R. § 69.3(e)(7) (requirement of averaged rates).

⁴ *Southwestern Bell Telephone Company, Tariff F.C.C. No. 73, Transmittal No. 2633*, CC Docket No. 97-158, Suspension Order, DA 97-1251 (Comp. Pric. Div., rel. June 13, 1997) (*SWBT Tariff Suspension Order*), at para. 9.

⁵ An "individual case basis" or ICB offering occurs when a carrier adopts a separate price for a particular service or facility in response to each customer request for the service or facility. See *Local Exchange Carriers Individual Case Basis DS-3 Service Offerings*, CC Docket Nos. 88-136, 89-305, Memorandum Opinion and Order, 4 FCC Rcd 8634 (1989) (*DS-3 ICB Order*).

No. 2633 is justified under the doctrine of competitive necessity.⁶ On July 14, 1997, the Bureau issued an order designating issues for investigation and establishing a pleading cycle.⁷

3. Based on the limited record before us, we here find that Transmittal No. 2633 is a customer-specific tariff offering that is not available to similarly-situated customers. We find that Transmittal No. 2633 unreasonably discriminates against SWBT's customers in violation of section 202(a) of the Act, 47 U.S.C. § 202(a). Based on serious public interest concerns regarding the potential for this tariff to result in anticompetitive market foreclosures, we conclude that the competitive necessity doctrine does not provide a defense that would render reasonable Transmittal No. 2633's discriminatory rates.

II. BACKGROUND

4. Section 202(a) of the Act makes it unlawful for a common carrier to engage in unjust or unreasonable discrimination in its charges, practices, classifications, and services for "like" communications services.⁸ In addition, the Commission's rules require dominant LECs, *i.e.*, those that possess market power,⁹ to offer interstate access services at rates that are averaged throughout their individual study areas.¹⁰

5. SWBT has argued that the competitive necessity doctrine may make an otherwise unreasonably discriminatory tariff lawful under section 202(a), and provide an exception to the Commission's rules. As explained in more detail below, dominant carriers have, on occasion, relied on this doctrine in their attempts to justify certain volume discounts for private line and special access tariffs that would otherwise be considered unreasonably discriminatory under section 202(a) of the Act.

⁶ Transmittal No. 2633, Description & Justification (D&J) at 3, n.4.

⁷ *Southwestern Bell Telephone Company Tariff F.C.C. No. 73, Transmittal No. 2633*, CC Docket No. 97-158, Order Designating Issues for Investigation, DA 97-1472 (Com. Car. Bur., rel. July 14, 1997) (*Designation Order*). Parties filing comments include Time Warner Communications Holdings Inc. (Time Warner), U S West, MCI Telecommunications, Inc. (MCI), GST Telecom, Inc. (GST), KMC Telecom, Inc. (KMC), Sprint Communications Company L.P. (Sprint), Teleport Communications Group Inc. (TCG), AT&T Corp. (AT&T), and Bell Atlantic.

⁸ 47 U.S.C. § 202(a).

⁹ *See Hyperion Telecommunications, Inc. Petition Requesting Forbearance*, CC Docket 97-146, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 12 FCC Rcd 8596, 8608 n.71 (*Hyperion Order*) (defining non-dominant carriers as those that do not possess market power).

¹⁰ *See, e.g.*, 47 C.F.R. § 69.3(e)(7). A "study area" ordinarily consists of the entire geographic area served by a particular LEC in a single state. *See, e.g., Petition for Waivers Filed by GTE North Incorporated and PTI Communications of Michigan, Inc.*, 12 FCC Rcd 13882 (Acct. & Aud. Div. 1997).

6. The Commission's 1984 *Private Line Guidelines Order* established that a dominant LEC seeking to rely on the competitive necessity doctrine to offer volume discounts for generally available interstate special access services must demonstrate: (1) equally or lower priced competitive alternatives are generally available to customers of the discounted offering; (2) the discounted offering responds to competition without undue discrimination; and (3) the discount contributes to reasonable rates and efficient services for all users.¹¹ The Commission never has approved a customer-specific tariff under the competitive necessity doctrine.

7. In the years since the adoption of the *Private Line Guidelines Order*, the Commission has granted dominant LECs several other types of pricing flexibility,¹² but has declined to authorize incumbent LECs to provide individualized service offerings under contract tariffs¹³ and has rejected incumbent LECs' attempts to justify individualized service offerings under the competitive necessity doctrine. In the *DS-3 ICB Order*, the Commission reviewed and rejected incumbent LECs' invocation of the competitive necessity doctrine without considering the threshold issue of whether the defense should apply to single-customer offerings. In a tariff investigation involving a proposed SWBT RFP tariff with the same terms and conditions as Transmittal No. 2633, the Commission assumed *arguendo* that the doctrine applied. In both cases, the Commission held that the dominant LECs had failed to meet the doctrine's requirements.¹⁴ The United States Court of Appeals for the District of Columbia Circuit remanded the latter order to the Commission, stating the Commission had inadequately explained its decision.¹⁵ In the *SWB RFP Order*, the Commission had found,

¹¹ See *Private Line Rate Structure and Volume Discount Practices Guidelines*, CC Docket No. 79-246, Report and Order, 97 F.C.C.2d 923, 948 (1984) (*Private Line Guidelines Order*).

¹² See, e.g., *Expanded Interconnection With Local Telephone Company Facilities*, CC Docket No. 91-141, Memorandum Opinion and Order, 9 FCC Rcd 5154 (1994) (volume and term discounts for special access and switched transport) (*Virtual Collocation Order*); *Access Charge Reform NPRM*, CC Docket No. 96-262, Third Report and Order, 11 FCC Rcd 21354, 21487 (1996) (removal of lower pricing limit in price caps). See also *NYNEX Telephone Companies Petition for Waiver*, Memorandum Opinion and Order, 10 FCC Rcd 7445 (1995) (*Universal Service Preservation Plan Order*); *Ameritech Operating Companies Petition for a Declaratory Ruling and Related Waivers to Establish a New Regulatory Model for the Ameritech Region*, Order, 11 FCC Rcd 14028 (1996) (*Customers First Order*). See also Section IV.A.2.b.(1), *infra*.

¹³ See *Virtual Collocation Order*, 9 FCC Rcd at 5206-5207; *Expanded Interconnection with Local Telephone Company Facilities*, Memorandum Opinion And Order, 9 FCC Rcd 2718, 2731 (1994) (*Expanded Interconnection Order*).

¹⁴ See *DS-3 ICB Order*, 4 FCC Rcd at 8643; *Southwestern Bell Telephone Company, Tariff FCC No. 73, Transmittals Nos. 2433 and 2449*, CC Docket No. 97-158, Order Terminating Investigation, 11 FCC Rcd 1215 (rel. Nov. 29, 1996) (*SWB RFP Order*), remanded, *Southwestern Bell Tel. Co. v. F.C.C.*, 100 F.3d 1004 (D.C. Cir. 1996).

¹⁵ *Southwestern Bell Tel. Co. v. FCC*, 100 F.3d at 1008.

inter alia, that SWBT failed to satisfy the first prong of the competitive necessity doctrine -- that an equal or lower priced alternative is generally available to customers of the discounted offering.¹⁶ The Commission had concluded that the mere existence of a customer request for a particular service does not establish that competitive alternatives actually exist. According to the Commission, "the existence and degree of competition might be determined by the existence of *responses* to a [request for proposal] not by the existence of the request for proposal itself."¹⁷ On review, the court identified what it termed a "Catch-22 situation" in the Commission's application of the competitive necessity doctrine to SWBT's RFP tariff. The D.C. Circuit observed that the Commission's order required SWBT either to obtain its competitors' rates, which could violate antitrust laws, or to lose competitive bids. The court thus remanded the matter to the Commission for clarification of the "difficult underlying policy issues" surrounding the application of the competitive necessity doctrine to an RFP tariff.¹⁸ This remand proceeding is currently pending before the Commission.

8. The Commission also is considering in our currently pending *Access Charge Reform* rulemaking proceeding, CC Docket No. 96-262, whether we should change our current policies regarding the circumstances in which incumbent price cap LECs may offer special RFP tariff or contract tariff rates in light of the new competitive paradigm embraced by the Telecommunications Act of 1996.¹⁹ In the rulemaking, the Commission is considering, in light of the statutory objectives of competition and deregulation, the possible public interest benefits of permitting incumbent LECs to offer lower prices in response to written bid requests and the anticompetitive effects of permitting substantial pricing flexibility prior to the development of significant competition in the local exchange and exchange access markets. The notice of proposed rulemaking in the *Access Charge Reform* docket did not specifically discuss the competitive necessity doctrine, but did expressly seek comment on the possibility of allowing dominant incumbent LECs to offer RFP tariffs if they could prove that certain levels of market-opening measures had been implemented or a certain level of competition existed in access markets.²⁰

III. STATEMENT OF FACTS

¹⁶ *Southwestern Bell Tel. Co. v. FCC*, 100 F.3d at 1007. See also *SWB RFP Order*, 11 FCC Rcd at 1221.

¹⁷ *Southwestern Bell Tel. Co. v. FCC*, 100 F.3d at 1007.

¹⁸ *Id.* at 1008.

¹⁹ See *Access Charge Reform*, Notice of Proposed Rulemaking, CC Docket No. 96-262, 11 FCC Rcd 21354, 21439 (1996) (*Access Charge Reform NPRM*). See also *Access Charge Reform*, CC Docket Nos. 96-262, 94-1, 91-213, 95-272, First Report and Order, FCC 97-158 (rel. May 16, 1997) (*Access Charge Reform Order*) at para. 260 (announcing subsequent order in ongoing proceeding would address pricing flexibility).

²⁰ *Access Charge Reform NPRM*, 11 FCC Rcd at 21439.

9. SWBT's Transmittal No. 2633 proposes to amend SWBT's interstate access tariff by adding a new Section 29, "Request for Proposal (RFP)." This new section sets forth the terms and conditions under which SWBT may respond to customer requests for proposal submitted to SWBT in competitive bid situations.²¹ Under the tariff, the only requirement governing the submission of an RFP is that submitting customers must "indicate in their RFP that the request involves a competitive situation."²² Under the terms of the proposed tariff provision, the RFP rates may be used by any "similarly situated customer that submits a RFP requesting the same service in the same quantities and at the same Central Office(s)."²³ Nothing in the tariff requires SWBT to respond to any RFP submitted.

10. SWBT initially proposes to establish RFP rates in response to RFPs received from two particular customers seeking competitive bids for the provision of access service.²⁴ SWBT seeks to provide those customers with individualized rates instead of offering SWBT's generally available tariffed rates. SWBT states it received the first RFP letter on February 11, 1997 from AT&T Corp. (AT&T), which requested that SWBT respond to an RFP for multiple DS-3 circuits in the Dallas, Texas area between various SWBT central offices and two of AT&T's points of presence (POPs).²⁵ AT&T's letter notes that SWBT's tariffed rates are "significantly higher than those of other access providers in the area."²⁶ SWBT states that it received a second RFP letter on February 13, 1997, from Coastal Telephone Company (Coastal), requesting a competitive bid to provide multiple 45 "Mbps" interfaces configured in a "self-healing" network architecture in the Houston, Texas area.²⁷ In the letter, Coastal

²¹ See Transmittal No. 2633, Original Page 29-4.

²² *Id.*

²³ Transmittal No. 2633, Section 29.3, Original Page 29-4. An incumbent LEC's "central office" is where the local loops serving end users interconnect with the LEC's exchange system. See SWBT Tariff F.C.C. No. 73, Section 2.7. The central office contains switches, allowing the incumbent LEC to switch, transport, and terminate local and long distance traffic.

²⁴ Under proposed tariff provisions, customers may utilize the facilities that would be provided by SWBT for special or switched access. Transmittal No. 2633, Proposed Section 29.3(4).

²⁵ Transmittal No. 2633, *Description & Justification* (D&J) at 4-5. SWBT provides a copy of AT&T's letter as Attachment 3 to its D&J. A "POP" is the long distance carrier's facility where it connects to the incumbent LEC's network.

²⁶ D&J, Attachment 3. Although this statement by AT&T appears to invite SWBT to deviate from its tariffed rates, AT&T contends in its petition that SWBT has no authority to do so. See *Id.* See also AT&T Comments at 4-6.

²⁷ *Id.* at 5. The acronym "Mbps" stands for megabits per second and is used to describe the rate at which digital signals are exchanged. A "self-healing" network is a fiber ring network, which uses digital signals, and is configured with redundant transmission over separate physical facilities so that the network will continue to

indicates that it has contacted other vendors to obtain additional bids.²⁸ SWBT assumes that Coastal has access to its generally available tariffed rates for access service, which are publicly available, and thus that Coastal seeks a competitive bid from SWBT that will be less than SWBT's generally available tariffed rates.²⁹

11. The proposed tariff under review here restricts the availability of the special AT&T and Coastal rates to customers that have a specific number of DS3s, DS3/1 multiplexers, Digital Transmission links, and/or access nodes within a limited geographical location.³⁰ For example, the rate structure proposed in response to AT&T's RFP is restricted to customers with at least 164 DS3s in 25 specific locations in the Dallas area and at least 142 DS3/1 multiplexers, located within the geographical areas defined by AT&T's points of presence at Addison, Texas and Taylor, Texas and the twenty different SWBT end offices in Dallas.³¹ In the case of Coastal's RFP, the tariff provides specific rates for at least 25 Digital Transmission links and 2 multiplexers within the geographical area defined by Coastal's point of presence in Houston and SWBT's Houston specific end offices.³² For example, in the case of AT&T's RFP, the tariff makes these rates available to those customers that (1) have the requisite service requirements of at least 164 DS3s and 142 DS3/1 multiplexers, and (2) are located in proximity to the identified Dallas end offices. Thus, based on the language of the tariff, a customer in the SWBT Tulsa LATA that had 164 DS3s and 142 DS3/1 multiplexers would not be "similarly situated" and therefore could not take advantage of these proposed rates under Transmittal No. 2633, which are below SWBT's generally available tariffed

operate even if a section of the ring is broken. See Kingsley, Scott & Jane F. Lipp, *Choices in SONET ring architecture*, Bus. Communications Review, Jun. 1, 1994 (explaining fiber ring technology).

²⁸ *Id.* SWBT provides a copy of Coastal's letter as Attachment 4 to its D&J.

²⁹ *Id.*

³⁰ A "DS3" is a high capacity access line, typically used for high volume traffic. It carries the equivalent of 672 voice-grade-equivalent channels of communication. A "DS3/1 multiplexer" is a device that electronically converts circuits on a DS1 traffic line so that they can be carried on a DS3 line. See SWBT Tariff F.C.C. No. 73, Section 20.2.1. An access node is either a telephone company central office or a customer-designated premises that has the equipment necessary to connect to a fiber ring. *Id.* at Section 2.6. The "Digital Transmission Link" is the facility that interconnects customer-selected access nodes to form the fiber ring configuration. See *Id.*, Section 19.1.

³¹ See Transmittal No. 2633, Section 29.3, Original Page 29-4. See also D&J at 9.

³² See Transmittal No. 2633, Section 29.3, Original Page 29-6.

rates.³³

12. The Bureau's designation order identified the following issues for investigation:

- (1) Whether Transmittal No. 2633 violates the Commission's policy prohibiting dominant LECs from offering contract tariffs.
- (2) Whether Transmittal No. 2633 violates the DS-3 ICB Order's restrictions on tariff offerings on an individual case basis by dominant LECs.
- (3) Whether Transmittal No. 2633 violates section 69.3(e)(7) of the Commission's rules requiring dominant LECs to offer averaged rates throughout their individual study areas.
- (4) Whether the Competitive Necessity doctrine applies, and if so, whether SWBT has satisfied its requirements.³⁴

13. The *Designation Order* tentatively concluded that Transmittal No. 2633 violates, *inter alia*, the Commission rule prohibiting dominant LECs from offering deaveraged access rates.³⁵ The *Designation Order* also denied SWBT's one-sentence waiver request, contained in a footnote to SWBT's Description and Justification for Transmittal No. 2633, on the ground that SWBT had failed to identify the rules to be waived or any special circumstances that would justify grant of a waiver.³⁶

14. As indicated above, Designation Issue 4 asked about the applicability of the competitive necessity doctrine. The Bureau sought comment as to whether competitive necessity should be available to a dominant LEC as a defense to claims that its charges for particular interstate services are unreasonably discriminatory.³⁷ The Bureau also asked whether the competitive necessity doctrine should be changed in any way, and, if so, how.³⁸

³³ See D&J at 13 ("[I]n the case of the RFP proposal for Coastal, any customer who requests an STN [self-healing] network for 25 DTLs and 2 multiplexers with 4 nodes (consisting of 1 customer premises and 3 SWBT central offices as listed in the tariff) would be eligible for the same rate as proposed in that RFP.").

³⁴ *Designation Order* at para. 15.

³⁵ *Designation Order* at para. 23.

³⁶ *Designation Order* at para. 14.

³⁷ *Designation Order* at para. 24.

³⁸ *Designation Order* at para. 25.

IV. DISCUSSION

15. As explained below, based on the limited record before us, we find Transmittal No. 2633 unlawful. We find that the proposed tariff violates section 69.3(e)(7) of our rules requiring dominant LECs to offer study-area-wide averaged rates. We also find that the competitive necessity doctrine does not provide a defense to that violation or render reasonable the transmittal's discriminatory rates. We conclude that the Commission has never permitted a dominant carrier to justify, on the basis of competitive necessity, a tariff like Transmittal No. 2633, *i.e.*, a customer-specific offering not generally available to similarly-situated customers. In addition, we decline, based on the limited record here, to apply the competitive necessity defense to Transmittal No. 2633, because of serious public interest concerns that SWBT could unreasonably employ this proposed tariff to forestall the development of competition by foreclosing or deterring market entry.

A. Issues Designated for Investigation

1. Transmittal No. 2633 violates section 69.3(e)(7) of the Commission's rules requiring dominant LECs to offer averaged rates throughout their individual study areas.

16. In the *Designation Order* the Bureau noted that section 69.3(e)(7) of the Commission's rules requires dominant LECs to offer averaged rates throughout their individual study areas,³⁹ and that section 69.123(c) of the Commission's rules provides that dominant LECs that offer density zone pricing must provide averaged rates within each density zone.⁴⁰ The Bureau sought comment on whether Transmittal No. 2633 violates sections 69.3(e)(7) or 69.123(c) of the rules.

17. In its Direct Case, SWBT argues that Transmittal No. 2633 does not violate the Commission's rule requiring averaged rates because the competitive necessity doctrine is an exception to that rule.⁴¹ In support, SWBT argues that the Commission's prior order on SWBT's RFP tariff shows that such an exception exists to this rule.⁴² TCG argues that SWBT has misread the order, and that the Commission expressly took no position on whether the competitive necessity doctrine provides a defense to the Commission's deaveraging rules.⁴³

³⁹ 47 C.F.R. § 69.3(e)(7).

⁴⁰ *Id.* at § 69.123(c).

⁴¹ SWBT Direct Case at 3-4.

⁴² SWBT Direct Case at 4 (citing *SWB RFP Order*).

⁴³ TCG comments at 8.

GST contends that Transmittal No. 2633 does not comply with either section 69.3(e)(7) or any of the exceptions to this rule recognized by the Commission.⁴⁴ MCI argues that SWBT has cited no precedent that would permit SWBT to utilize competitive necessity to de-average rates beyond the point contemplated by section 69.123(c).⁴⁵ In its Reply, SWBT argues that section 69.3(e)(7) does not impose a mandatory obligation on all LEC tariffs because it states that a carrier "may file a tariff that is not an association tariff." SWBT argues that, because the section does not state that a LEC *must* file a tariff, it is a permissive rather than a mandatory rule, and as such, a waiver is not required.⁴⁶

18. We conclude that Transmittal No. 2633 would permit SWBT to offer service at deaveraged rates within its study area, and does not comply with the density zone pricing exception provided by section 69.123(c).⁴⁷ We reject SWBT's argument that section 69.3(e)(7), which prohibits deaveraging, does not apply to SWBT's tariff. SWBT does not dispute that its tariff is filed pursuant to section 69.3(e) and concedes that such a tariff "must comply with" subsection (7) of that rule. It is thus beyond question that this tariff must contain averaged rates in order to be lawful, subject to any exceptions that the Commission may recognize. Accordingly, we find that Transmittal No. 2633 violates section 69.3(e)(7) of our rules.

2. The competitive necessity doctrine is not available in this situation.

19. SWBT relies on the competitive necessity doctrine as a defense against the rule violations identified in the *Designation Order*. In response to the *Designation Order*, various parties submitted comments concerning the use of the doctrine in this context.

a. Comments

20. SWBT's legal arguments that competitive necessity must apply stem from its interpretation of the D.C. Circuit's ruling in *Southwestern Bell Tel. Co. v. FCC*, and past Commission precedent. SWBT argues that *Southwestern Bell Tel. Co. v. FCC* does not leave room for the Commission to refrain from applying the competitive necessity doctrine to incumbent LECs. SWBT characterizes the Commission's action in the *SWBT RFP Order* as "explicitly refraining from holding that the competitive necessity doctrine" did not apply to

⁴⁴ GST comments at 6.

⁴⁵ MCI comments at 4-5.

⁴⁶ SWBT Reply at 5.

⁴⁷ See 47 C.F.R. § 69.123(c) (explaining exception to averaged rates rule). See also *Southwestern Bell Tel. Co. v. FCC*, 100 F.3d at 1005-1006 (recognizing that SWBT RFP tariff offered services at rates "lower than its geographically averaged rates").

dominant LECs. It argues that, because the Commission explicitly refrained from holding that the doctrine did not apply in that case, we must now hold that it does apply in the instant matter.⁴⁸ SWBT further argues that prior rulings, such as *Private Line Guidelines Order*, did not distinguish between different kinds of common carriers, and thus, any carrier may invoke the doctrine.⁴⁹ SWBT argues that, because the Commission did not draw any distinctions between the kinds of carriers permitted to invoke the doctrine in the past, it may not do so now.⁵⁰ SWBT also attaches to its comments a 1989 law review article describing the history of the Commission's application of the competitive necessity doctrine, and describing the economic benefits of making this doctrine applicable to individual customer offerings.⁵¹

21. SWBT argues that it does not seek a determination that the competitive necessity doctrine is a complete defense to any claimed violation of section 202(a). Rather, SWBT states that it is merely asking the Commission to apply the competitive necessity doctrine "consistently" with its other orders, rules, and policies. SWBT points to the *Hyperion Order* in which the Commission permitted competitive LECs the use of pricing flexibility in the form of permissive detariffing, notwithstanding section 202(a). According to SWBT, the Commission's reasoning in the *Hyperion Order* granting permissive detariffing should not be limited to competitive LEC providers, especially in those situations where competition is evidenced by an RFP.⁵²

22. SWBT further claims that the Commission, in the *Regulation of Basic Services NPRM* issued in 1987, recognized the need to reduce regulation for dominant carriers. The *Regulation of Basic Services NPRM* sought comment on whether the Commission could target as candidates for deregulation services awarded after bidding by a business or governmental organizations.⁵³ SWBT states that in the *Regulation of Basic Services NPRM*, the Commission tentatively concluded that no further proof of competition was necessary other

⁴⁸ SWBT Direct Case at 5.

⁴⁹ SWBT Direct Case at 5.

⁵⁰ SWBT Direct Case at 7.

⁵¹ SWBT Direct Case at Appendix 1 (Alexander C. Larson, Calvin S. Monson, Patricia J. Nobles, "Competitive Necessity and Pricing in Telecommunications Regulation," 42 F. Comm. L. J. 1 (1989)).

⁵² SWBT Direct Case at 1-2.

⁵³ *Ex parte*, Letter from Thomas A. Pajda, Attorney for Southwestern Bell Telephone Company, to William F. Caton, Secretary, Federal Communications Commission, October 9, 1997 (*SWBT October 9, 1997 Ex Parte*) at 2 (citing *Decreased Regulation of Certain Basic Telecommunications Services*, 2 FCC Rcd 645 (1987) (*Regulation of Basic Services NPRM*)).

than the fact that "such a [competitive] bidding process takes place."⁵⁴ According to SWBT, this tentative conclusion "confirms" that SWBT need not show anything more to satisfy the first prong of the competitive necessity test in an RFP situation.

23. SWBT, U S West, and Bell Atlantic contend that the access services market today does not differ from the long distance market during the period when the Commission permitted AT&T to invoke the competitive necessity doctrine. SWBT argues that access service is merely a part of long distance service, and that to consider the access market separately from the long distance market is to draw an artificial distinction that was created by the divestiture of the Bell Operating Companies (BOCs) from AT&T.⁵⁵ SWBT argues there is no reason for presently regulating those pieces differently.⁵⁶ SWBT also claims generally that, like the IXC market in the 1980s, there exist many competing providers of access services, including both facilities-based and resale providers. SWBT argues that, based on the RFPs at issue in this case, as well as past RFPs, it has apparently lost business to another provider, a situation SWBT contends is not uncommon in many of the markets it serves.⁵⁷ SWBT claims that in 1984 AT&T maintained an 84.2% share of the interstate switched market. Citing a November 1996 Quality Strategies Report, SWBT asserts that its losses exceed AT&T's market share losses in the 1980s, because SWBT's competitors have won more than a 40% share of certain major access markets.⁵⁸ U S West claims it also has experienced significant losses of market share in the special access market in several large cities in its region. U S West asserts that competition for high capacity special access service is "full blown" in many markets and, given this high level of competition, there is no need for case-by-case application of the competitive necessity doctrine for this service. U S West also argues that the Commission should approve contract tariff flexibility as soon as possible in its *Access Charge Reform* proceeding.⁵⁹ U S West also includes an affidavit from an economist discussing the benefits of contract pricing for LECs.⁶⁰

24. U S West further argues that, where the competitive necessity doctrine is met, there exists no economic or other policy justification for barring incumbent LECs from

⁵⁴ *Id.* at 3.

⁵⁵ SWBT Direct Case at 7.

⁵⁶ SWBT Direct Case at 7.

⁵⁷ SWBT Direct Case at 7-8.

⁵⁸ SWBT Direct Case at 8.

⁵⁹ U S West comments at 13-14.

⁶⁰ Affidavit of Robert G. Harris attached to U S West comments.

relying on it.⁶¹ It argues that the same considerations that led the Commission to allow AT&T pricing flexibility long before it was found to face substantial competition, let alone non-dominance, exist in today's access market.⁶² U S West contends that the Commission applied the doctrine to private line and MTS services in the mid-1980s because AT&T then faced emerging, not full or substantial, competition. U S West further asserts that, in the *OCP Guidelines*⁶³ case, the Commission recognized it would not be wise to prevent AT&T from responding to competition prior to the market becoming "fully competitive" as this would send erroneous signals to the marketplace, resulting in inefficient competitive entry.⁶⁴ U S West additionally claims that failure to permit SWBT to respond to competition for its high revenue, low cost customers will cause SWBT to lose revenue, eventually endangering its ability to provide universal service.

25. In opposition to Transmittal No. 2633, MCI and AT&T argue that in deciding the *Interexchange Order*,⁶⁵ which held that AT&T could offer contract tariffs only upon a showing that substantial competition existed for the long-distance services that could be included in the contract tariff, the Commission effectively abandoned the competitive necessity doctrine for individualized offerings, and replaced it with a substantial competition standard.⁶⁶ AT&T contends that allowing the pricing flexibility sought by SWBT here might stifle the emerging competition for access services before competitors can gain a meaningful foothold in the market.⁶⁷ Time Warner argues that high local entry barriers in combination with new entrants' disproportionate reliance on a small number of large customers make strategic pricing by dominant LECs especially threatening to emerging competition in the local market context.⁶⁸ In contrast, Time Warner asserts, once an incumbent LEC faces substantial competition, and new entrants have sunk the costs required to enter the local

⁶¹ U S West comments at 11.

⁶² U S West comments at 11.

⁶³ *Guidelines for Dominant Carriers' MTS Rates and Rate Structure Plans*, CC Docket No. 84-1235, Memorandum Opinion and Order, 59 Rad.Reg.2d 70 (1985) (*OCP Guidelines*).

⁶⁴ U S West comments at 11.

⁶⁵ *Competition in the Interstate Interexchange Marketplace*, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880, 5897 (1991) (*Interexchange Order*).

⁶⁶ MCI comments at 7-8; AT&T comments at 5.

⁶⁷ AT&T comments at 7.

⁶⁸ Time Warner comments at 14.

market on a widespread basis, strategic pricing is unlikely to be successful.⁶⁹

26. Sprint states that SWBT has provided no evidence that the local access market is subject to meaningful competition or that SWBT is close to the degree of private line competition AT&T faced in 1984. Sprint further notes SWBT has furnished market figures only for Dallas and Houston, and only for high capacity service, whereas the market share given for AT&T reflects competition for switched services in general, not the discrete private line market segment.⁷⁰ Time Warner asserts that SWBT's citation of market penetration by competitors is misleading. It states SWBT's share of the entire market for access services, as opposed to its share of the market for high capacity services, is much higher today than was AT&T's share of the long distance market in 1984.⁷¹ AT&T states that although SWBT may have presented data that there is emerging competition for high capacity access services in Dallas, SWBT retains the overwhelming share of the market in other major cities in its serving area, including St. Louis (85%) and Kansas City (93%).⁷²

27. MCI argues that, to obtain the relief it seeks, SWBT must file a waiver petition and prove that competition exists within a defined geographic area, like the showings of NYNEX in the *Universal Service Preservation Plan Order*,⁷³ and Ameritech in the *Customers First Order*.⁷⁴

28. Time Warner further argues that today's access market differs markedly from the long distance market of the 1980s. It argues that, unlike post-divestiture AT&T, today incumbent LECs such as SWBT are the sole suppliers of facilities essential to the success of their competitors, such as reasonably priced collocation and operations support systems (OSS).⁷⁵ According to Time Warner, to encourage cooperative behavior by incumbent LECs, the Commission must withhold pricing flexibilities such as competitive necessity until

⁶⁹ Time Warner comments at 14.

⁷⁰ Sprint comments at 6.

⁷¹ Time Warner comments at 16 n.31.

⁷² *Ex parte*, Letter from Charles Griffin, AT&T to William F. Caton, Acting Secretary, Federal Communications Commission, November 7, 1997 (citing *SWBT Transmittal No. 2622*, filed March 25, 1997, Southwestern Bell HICAP Track, Third Quarter 1996, p. 7).

⁷³ 10 FCC Rcd 7445. In this order, the Commission permitted NYNEX to deaverage certain access charge elements in LATA 132 after finding that "the earlier monopoly environment has eroded to a sufficient degree" in that LATA. *Id.* at 7462.

⁷⁴ 11 FCC Rcd 14028.

⁷⁵ Time Warner comments at 10-11.

incumbent LECs prove they furnish needed competitive inputs to their competitors.⁷⁶ Time Warner contends there is no way for the Commission to use competitive necessity to prevent predatory and strategic pricing by incumbent LECs prior to development of adequate competition.⁷⁷ As noted above, Time Warner believes strategic pricing remains likely until substantial competition for access services exists.

29. Time Warner contends the law review article cited by SWBT in its Direct Case is inapposite because lower entry barriers existed in the long distance market of the 1980s. In contrast, facilities-based competition, which requires high sunk costs, remains the only viable source of competition to incumbent LEC access services.⁷⁸ Time Warner argues that resale, a significant source of competition to AT&T during the 1980s, is less threatening to incumbent LECs today because resale requires functioning OSS, which must be provided by the incumbent LEC.⁷⁹

30. Time Warner additionally notes that the Commission already has granted incumbent LECs significant pricing flexibility to enable these companies to respond to competition. This flexibility includes eliminating the lower price bands for access services, allowing substantial volume and term discounts, and permitting geographic deaveraging for switched transport services. Time Warner refutes SWBT and U S West's arguments about inefficient entry by new entrants. According to Time Warner, the new entrants' knowledge that the Commission will likely grant additional pricing flexibilities will deter SWBT's competitors from engaging in inefficient entry.⁸⁰ Time Warner asserts that the existence of two alternative providers of high capacity service is insufficient evidence of competition for the Commission to make a determination about whether SWBT should be allowed to employ RFP tariffs that are anticompetitive.⁸¹ Instead, Time Warner argues that the Commission should examine the competitiveness of other services SWBT provides over the same facilities (including supply and demand and prices SWBT has charged under price caps) to determine opportunities for cross-subsidy, similar to the inquiry that the Commission engaged in prior to granting contract tariff authority to AT&T. According to Time Warner, allowing competitive necessity pricing prior to conducting such an inquiry might permit SWBT to lower the price it charges for high capacity service by overallocating joint and common costs to other services.

⁷⁶ Time Warner comments at 12-13.

⁷⁷ Time Warner comments at 13.

⁷⁸ Time Warner comments at 15.

⁷⁹ Time Warner comments at 14-15.

⁸⁰ Time Warner comments at 15, n.29.

⁸¹ Time Warner comments at 16.

Time Warner believes the Commission also would need to define properly the geographic markets at issue in order to prevent SWBT and other incumbent LECs from utilizing competitive necessity to misallocate joint and common costs from competitive to non-competitive markets.⁸²

b. Discussion

31. We find for the reasons detailed below that the competitive necessity doctrine does not provide a defense for any of the violations at issue here.⁸³ Specifically, we find that Commission precedent does not address the specific circumstances at issue here and therefore does not require application of the competitive necessity doctrine for the individualized tariff offerings that Transmittal No. 2633 would permit. Moreover, because of our concerns about facilitating the development of competition and preventing foreclosure or deterrence to market entry by new entrants, we decline, based on the record here, to apply the competitive necessity defense to Transmittal No. 2633, a customer-specific tariff offering that is not available to similarly situated customers.

(1) Commission precedent does not require application of the competitive necessity doctrine to tariffs that are not generally available.

32. Contrary to the arguments advanced by SWBT, we do not find that past Commission precedent requires the conclusion that SWBT is entitled to invoke the competitive necessity doctrine in defense of Transmittal No. 2633. Commission precedent reveals instead that this agency has rarely applied the competitive necessity doctrine as a defense for otherwise discriminatory rates or practices, particularly in the context of offerings that were not generally available to similarly situated customers. In those rare instances when the Commission has considered the doctrine as a defense for tariff offerings that were not generally available to similarly situated customers, the Commission rejected the proposal as unlawfully discriminatory in violation of section 202(a), finding that the carrier was unable to satisfy its burden under the competitive necessity doctrine.⁸⁴ We discuss below those cases that form the history of the Commission's consideration of the competitive necessity doctrine as a defense to claims that a carrier's proposed rates were unjust and unreasonable.

⁸² Time Warner comments at 16.

⁸³ In this Order, we conclude that Transmittal No. 2633 violates section 202(a) and our rules requiring rate averaging. Because these grounds are sufficient for rejecting the tariff, we do not reach the issue of whether the Transmittal violates other rules as well. See Section IV.A.3., *infra*.

⁸⁴ See DS-3 ICB Order, AT&T CPP Order, *infra*.

33. Telpak Proceedings. In the *Telpak* proceedings in the 1960's and 1970's, the Commission permitted AT&T to invoke the competitive necessity doctrine on multiple occasions as a possible defense to allegations that proposed volume discounts for certain "private line" services were discriminatory.⁸⁵ AT&T proposed the volume discounts in response to competition presented by new market entrants using new technology to provide a less expensive alternative to AT&T's private line services.⁸⁶ In the absence of an articulated policy regarding pricing flexibility for AT&T services, the Commission imported to address these issues the Interstate Commerce Commission's application of the competitive necessity doctrine.⁸⁷ Under the Commission's application of the competitive necessity doctrine at that time, AT&T was unable to satisfy the heavy burden necessary to justify its facially discriminatory rates.⁸⁸ In finding that the Telpak tariff was discriminatory and that the discrimination was not justified by the competitive necessity doctrine, the Commission ruled

⁸⁵ See *American Tel. and Tel. Co. Tariff* F.C.C. No. 250, TELPAK, Tentative Decision, 38 F.C.C. 370, Final Decision, 37 F.C.C. 1111 (1964); *Telpak Tariff Sharing Provisions of American Tel. and Tel. Co. and the Western Union Tel. Co.*, CC Docket No. 17457, 23 F.C.C.2d 606, 613 (June 10, 1970), *aff'd in part, rev'd in part*, *American Tel. and Tel. Co. v. FCC*, 449 F.2d 439 (2d Cir. 1971); *American Tel. & Tel. Co. Revisions to Tariff* F.C.C. Nos. 260 and 267 concerning Resale and Shared Use, Transmittal No. 12715, CC Docket 20097, Memorandum Opinion and Order, 64 F.C.C.2d 1003, 1004 (rel. June 16, 1977), *aff'd in part and rev'd in part sub nom. Aeronautical Radio, Inc. v. FCC*, 642 F.2d 1221 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 920 (1981). Private line services provide a customer with continuous communication between fixed points without the necessity of establishing a new circuit for each call or message. See *Aeronautical Radio v. FCC*, 642 F.2d 1221, 1224 (D.C. Cir. 1980).

⁸⁶ *American Tel. and Tel. Co. Tariff* F.C.C. No. 250, TELPAK, Tentative Decision, 38 F.C.C. 370, Final Decision, 37 F.C.C. 1111 (1964).

⁸⁷ 38 F.C.C. at 374.

⁸⁸ *Telpak Tariff Sharing Provisions of American Tel. and Tel. Co. and the Western Union Tel. Co.*, CC Docket No. 17457, 23 F.C.C.2d 606, 613 (June 10, 1970), *aff'd in part, rev'd in part*, *American Tel. and Tel. Co. v. FCC*, 449 F.2d 439 (2d Cir. 1971). Specifically, the Commission stated that the carrier seeking to invoke the doctrine must demonstrate:

- (1) That those benefiting from the discrimination have an alternative of satisfying their communications requirements from a substitute source of supply and that they will shift to the substitute source unless the discrimination is maintained;
- (2) That the discriminatory rate or preference is just sufficient to retain the business which would otherwise be lost; [and]
- (3) That the discrimination benefits the users of the companies' services who are discriminated against; *i.e.*, charges to other users are lower because of the discriminatory rate than they would be without such rates.

that the Telpak rates must be offered under a generally available tariff.⁸⁹ The Court of Appeals upheld the Commission's strict application of the doctrine to AT&T's discriminatory rates.⁹⁰

34. Private Guidelines Order. In early 1984, with the implementation of the AT&T divestiture and the initiation of LEC access tariffs, the Commission also considered the availability of competitive necessity as a defense against charges of otherwise unlawful discrimination.⁹¹ In the *Private Line Guidelines Order*, the Commission promulgated certain guidelines for review of proposed volume discounts in the generally available tariffs for unswitched services offered by AT&T (private line) and the LECs (special access).⁹² In addition, the Commission, referencing a Robinson-Patman Act competitive necessity case, found that a dominant carrier could attempt to justify a volume discount in a private line or special access offering under a somewhat relaxed version of a *Telpak* competitive necessity showing.⁹³ Under this test, which remains the Commission's most recently applied test, the dominant carrier could seek to justify such a generally available offering by demonstrating that: (1) the customers of the discounted offering have equal or lower priced alternatives that are generally available from which to choose; (2) the discounted offering responds to competition without undue discrimination; and (3) the discount contributes to reasonable rates

⁸⁹ *American Tel. & Tel. Co. Revisions to Tariff F.C.C. Nos. 260 and 267 concerning Resale and Shared Use*, Transmittal No. 12715, CC Docket 20097, Memorandum Opinion and Order, 64 F.C.C.2d 1003, 1004 (rel. June 16, 1977), *aff'd in part and rev'd in part sub nom. Aeronautical Radio, Inc. v. FCC*, 642 F.2d 1221 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 920 (1981). See also *American Tel. & Tel. Co. v. FCC*, 572 F.2d 17, 23-24 (2d Cir.), *cert. denied*, *International Business Machines Corp. v. FCC*, 439 U.S. 875, 99 S.Ct. 213, 58 L.Ed.2d 190 (1978) (upholding Commission policy of unlimited Telpak sharing as remedy to unlawful discrimination under Telpak).

⁹⁰ *American Tel. and Tel. Co. v. FCC*, 449 F.2d at 450.

⁹¹ Although the Commission had adopted rigid rate structure rules governing the provision of the new switched access service provided by LECs, effectively prohibiting the use of volume discounts for switched access service, it had not adopted rate structure rules for special access service and had no comparable rules to govern AT&T private line services.

⁹² *Private Line Guidelines Order*, 97 F.C.C.2d at 925. The guidelines included: (1) rate structures for the same or comparable services should be integrated; (2) rate structures for the same or comparable services should be consistent with one another; (3) rate elements should be selected to reflect market demand, pricing convenience for the carrier and customers, and cost characteristics; a rate element which appears separately in one rate structure should appear separately in all other rate structures; (4) rate elements should be consistently defined with respect to underlying service functions and should be consistently employed through all rate structures; and (5) rate structures should be simple and easy to understand. The guidelines did not preclude a carrier, in a given case when a private line tariff did not comply with the guidelines, from justifying its departure from them by showing that the tariff is just, reasonable, and nondiscriminatory. *Id.* at 950-951.

⁹³ *Id.*, 97 F.C.C.2d at 947-48.

and efficient services for all users.⁹⁴ In the *Private Line Guidelines Order*, the Commission's discussion indicated only that carriers could make competitive necessity showings to attempt to justify volume discounts for generally available private line and special access services.

35. OCP Guidelines Order. In 1985, the Commission developed guidelines for the review of certain AT&T switched long-distance service offerings (called optional calling plans (OCPs)) for generally available volume discounts.⁹⁵ The Commission crafted a standard known as the "net revenues" test, which permitted discounts if a carrier could prove the discounts contributed to its overhead over a given period.⁹⁶ The Commission held its decision should not be construed as "ruling out" use of the competitive necessity doctrine where a carrier could not satisfy the net revenues test, but found that the circumstances would be rare where a carrier that could not satisfy net revenues test would be able to pass the competitive necessity test.⁹⁷

36. DS-3 ICB Order. In 1989, the Commission addressed LEC offerings of individual case base (ICB) rates for special access DS3 services, finding that ICB pricing of DS-3 service raised a presumption of unreasonable discrimination under section 202(a) of the Act.⁹⁸ The Commission found that the ICB DS3 services and the generally tariffed DS3 services were "like" services provided at disparate rates. The Commission found that in that instance, the simultaneous use of averaged cost rates for some facilities and individual cost rates for other facilities would result in unreasonable discrimination that was unlawful.⁹⁹ Although LECs argued that the competitive necessity doctrine was a defense to claims of discrimination, the Commission concluded that the LECs had failed to meet their burden under the competitive necessity doctrine, finding that the LECs had offered merely anecdotal

⁹⁴ See *Id.*, 97 F.C.C.2d at 948.

⁹⁵ *OCP Guidelines Order*, 59 Rad.Reg.2d 70. Optional calling plans (OCPs) offer discounts or reduced rates for a specified period of calling to long distance customers in exchange for the customer's commitment to a fixed monthly charge or to participate for a minimum period of service.

⁹⁶ *OCP Guidelines Order*, 59 Rad.Reg.2d at 80-84. See also *AT&T Revisions to Tariff F.C.C. No. 1, Transmittal Nos. 3380, 3537, 3542, 3543*, CC Docket No. 92-95, 7 FCC Rcd 7730 (1992) (approving AT&T calling card plan as not violating section 202(a) because the rates were generally available to any interested customer, citing *OCP Guidelines Order*).

⁹⁷ *OCP Guidelines Order*, 59 Rad.Reg.2d at 86.

⁹⁸ *DS-3 ICB Order*, 4 FCC Rcd at 8641-8642.

⁹⁹ *DS-3 ICB Order*, 4 FCC Rcd at 8642 (concluding that although it "might be theoretically possible" for such an arrangement to be fair, just, and reasonable, based on the record, the LECs failed to "achieve such a result").

evidence of competition to justify the individual offerings.¹⁰⁰ The Commission specifically ordered SWBT to convert its ICB rates for DS-3 service to generally available rates.¹⁰¹

37. AT&T CPP Order. Also in 1989, in the *AT&T CPP Order*, AT&T sought to offer a discounted rate to a single customer in response to an offer to that same customer by MCI.¹⁰² During the course of the litigation, MCI broadened its offer, making it generally available to all similarly situated customers. Applying the competitive necessity doctrine, the Commission held AT&T's transmittal to be unreasonably discriminatory, ruling that under the second prong of the test AT&T's offer was required to be equal in scope to MCI's. The Commission stated that it expressed no opinion regarding whether AT&T's transmittal was lawful at the time it was first filed, when MCI's offer had been limited to a single customer.¹⁰³ The Commission ultimately did not reach the issue of whether single-customer offerings were permissible under the competitive necessity doctrine.

38. AT&T's Tariff 15. In 1991, AT&T raised the issue of competitive necessity in the context of customer-specific offerings by filing its Tariff 15. This tariff proposed to permit AT&T to match individual competitors' offers brought to it by customers. In *Resort Condominiums International (RCI Order)*, the Commission rejected AT&T's attempt to justify below-tariff rates. Not reaching AT&T's competitive necessity argument, the Commission ruled that Tariff 15 represented an anti-competitive price signalling scheme.¹⁰⁴ Specifically, the Commission found that the pricing mechanism created under Tariff 15 had the effect of ensuring that AT&T's competitors had an understanding that, so long as they maintained their rates at a certain level, they would not trigger a rate reduction by AT&T. In addition, the Commission found that Tariff 15 limited the scope of competition by permitting rate reductions only in response to reductions initiated by competitors, and also by limiting its response merely to matching the competitor's price cut.¹⁰⁵

¹⁰⁰ *DS-3 ICB Order*, 4 FCC Rcd at 8643.

¹⁰¹ *DS-3 ICB Order*, 4 FCC Rcd at 8645, 8648.

¹⁰² *AT&T Communications Tariff F.C.C. No. 15 Competitive Pricing Plans*, CC Docket No. 88-471, Memorandum Order and Opinion, 4 FCC Rcd 7933 (1989) (*AT&T CPP Order*).

¹⁰³ *AT&T CPP Order*, 4 FCC Rcd at 7935.

¹⁰⁴ *AT&T Communications Tariff F.C.C. No. 15, Competitive Pricing Plan No. 2, Resort Condominiums International*, CC Docket No. 90-11, 6 FCC Rcd 5648, 5649 (1991) (*RCI Order*), remanded in an unpublished order (D.C. Cir., Jan. 21, 1992).

¹⁰⁵ *RCI Order*, 6 FCC Rcd at 5649-50. Later in 1991, the D.C. Circuit granted AT&T's motion for a stay of the *RCI Order*. The D.C. Circuit's three-sentence order granting the stay stated that AT&T "demonstrated satisfaction of the stringent standards required for a stay pending court review," but did not otherwise explain why the court granted AT&T's motion. In its brief, AT&T argued, *inter alia*, that the Commission had erred by

39. SWBT RFP Order. In 1995, in the *SWBT RFP Order*, involving an SWBT RFP tariff similar to this one, the Commission did not find that the competitive necessity doctrine provided a defense to discrimination charges in situations involving customer-specific tariffs. Rather, stating that it had never addressed the applicability of the competitive necessity doctrine to dominant LEC special access services, the Commission assumed *arguendo* that the doctrine applied, but found SWBT failed to meet the defense's requirements.¹⁰⁶

40. In summary, our precedent does not compel us to apply the competitive necessity doctrine in this case. In the overwhelming majority of our cases in which we considered the doctrine, the proposal involved tariffs that were generally available to similarly situated customers. In those rare instances that the Commission has applied the doctrine in the context of individualized offerings not generally available to similarly situated customers, the Commission rejected the proposals as unlawful without reaching the question of whether the doctrine even should be available to carriers proposing individualized offerings. In this case, we will directly address whether the competitive necessity doctrine should be available here.¹⁰⁷ For the reasons explained below, the public interest in this case requires that we not apply the competitive necessity doctrine to Transmittal No. 2633.

(2). Serious public interest concerns presented by Transmittal No. 2633 require that we prohibit SWBT from using the competitive necessity doctrine as a defense in this situation.

41. The Act, as amended by the 1996 Telecommunications Act, directs the Commission to establish rules and policies that remove barriers to entry in the local exchange and exchange access marketplace. Competition in these markets will lead to lower prices and better quality service. The benefits of a competitive marketplace can be derailed, however, by the practices of dominant carriers improperly seeking to retain their position in the marketplace through anticompetitive means.

relying on a price matching theory in rejecting Tariff 15. According to AT&T, the competitive necessity doctrine, as established under general antitrust law, justified Tariff 15. In 1992, the D.C. Circuit granted the Commission's motion for a voluntary remand of the *RCI Order*. Ultimately, the tariff at issue in the *RCI Order*, along with several similar AT&T tariffs based on competitive necessity, went into effect by operation of law.

¹⁰⁶ *SBC RFP Order*, 11 FCC Rcd at 1220. See also *GTE Telephone Operating Companies*, 11 FCC Rcd 3698 (Com. Car. Bur. 1995) (rejecting RFP tariff on vagueness grounds without reaching competitive necessity doctrine issue). SWBT appealed the *SBC RFP Order* and the DC Circuit remanded the matter to the Commission to resolve the difficult issues underlying the application of competitive necessity. *Southwestern Bell Tel. Co. v. FCC*, 100 F.3d at 1008.

¹⁰⁷ This is in contrast to the Commission's approach in the *RCI Order*.

42. Based on this record, we are concerned that Transmittal 2633 may permit SWBT unreasonably to deter or foreclose competitive entry into the markets in which it has a monopoly. As formulated, Transmittal 2633 allows SWBT a virtually unlimited opportunity to preempt new market entrants in its territory by reducing rates to individual customers to which it believes new entrants may make offers, without making those rates available to similarly situated customers elsewhere. The threat of such market foreclosure is inconsistent with our ultimate goal -- competition for the provision of access service and the deregulation of incumbent LEC access services.¹⁰⁸ Thus, absent a more persuasive showing of competition than exists in the record here, we find that the potential for SWBT to use this targeted tariff to deter market entry into its local exchange and exchange access market or to drive recent entrants from the market warrants a finding that offerings under Transmittal No. 2633 would be unreasonably discriminatory, the competitive necessity doctrine should not be available and, therefore, that Transmittal 2633 is unlawful.

43. The Customer-Specific Nature of Transmittal No. 2633. Transmittal No. 2633 sets forth a structure permitting the carrier to file specific rate quotes in response to RFPs. The proposed tariff would permit SWBT to file "application-specific rates," *i.e.*, rates not available in its generally available tariffs, in response to a customer RFP so long as the customer indicates in its RFP "that the request involves a competitive situation." Under the tariff, the entire definition of an RFP is that it: "Denotes a written request from a customer for a competitive bid on a service to be provided by the Telephone Company." Transmittal No. 2633 indicates that SWBT would make: "[t]he rates quoted to a customer in response to a RFP . . . available to any similarly situated customer that submits a RFP requesting the same service in the same quantities and at the same Central Office(s)." As SWBT explains in its supporting justification, the tariff language does not commit it to offer a special rate on all written requests that satisfy the tariff's definition of RFP. Under the tariff, a customer has "one hundred and eighty (180) days after receiving a Request for Proposal rate to order the service requested at the rate quoted." Transmittal No. 2633 would permit the use of RFP quotes throughout the SWBT service territory, though as noted, any particular quote would be for specific quantities of specific services at specific central offices.

44. Although SWBT claims that its tariff is "generally available to similarly situated customers," the tariff language belies this assertion. According to the tariff, the rates are only available to customers putting out written bid requests seeking the same services at the same quantities at the same central offices. We conclude, based on the restrictive language of Transmittal No. 2633 and our knowledge of the interstate access market, that the likelihood of more than the original requesting customer requiring the same quantities of the same services at the same central offices is negligible if not non-existent. SWBT has offered no evidence to convince us otherwise. Because the terms of Transmittal No. 2633 in practice prevent the possibility of a similarly situated customer, we find that Transmittal No. 2633 is

¹⁰⁸ *Access Charge Reform NPRM*, 11 FCC Rcd at 21363; *Access Charge Reform Order*, at para. 273.

not "generally available to similarly situated customers."

45. SWBT seeks the ability to offer RFP tariffs anywhere in its region without offering the discount to similarly situated customers, so long as that customer has submitted an "RFP." As defined by Transmittal No. 2633, an "RFP" is merely a written request for a price quote.¹⁰⁹ Such an approach could readily lead to numerous arrangements resulting from bilateral negotiations between customers seeking to obtain service at prices below tariffed rates and incumbent carriers, rather than *bona fide* competitive RFP procedures.¹¹⁰ Thus, it could be relatively easy for specific long-distance carriers to transfer their access purchases from a tariffed basis to a contract basis. Transmittal No. 2633 would permit SWBT to offer or decline to offer such rates to customers if, in its sole judgment, it determines that a "competitive situation" exists.¹¹¹ In light of the record before us, we decline to grant an incumbent LEC the unfettered ability to decide when to offer its interstate access services pursuant to individually negotiated contracts rather than pursuant to generally available access tariffs subject to Commission rules that further our public interest goals, such as competition and deregulation.

46. Evidence of Competition in this Record. SWBT's evidence of competition to justify Transmittal No. 2633 consists of the following: (1) "RFPs" consisting of one to two page letters from two customers, with one-page attachments;¹¹² (2) customer anecdotes, set forth in footnote 16 of the Description and Justification filed with Transmittal No. 2633, from a study commissioned by SWBT in 1993, in which SWBT customers state they would like to see SWBT be permitted to offer below-tariff rates;¹¹³ (3) tariff pages from MFS and TCG tariffs purporting to demonstrate that these companies offer equal- or lower-priced competitive alternatives;¹¹⁴ (4) a quotation from a Time Warner promotional brochure describing Time Warner's SONET ring network in Indianapolis, and a quotation from an MFS brochure describing that company's facilities in unspecified locations, which SWBT contends, demonstrate that the services described in the Time Warner and MFS tariff pages are comparable to the service that SWBT seeks to offer under this transmittal; (5) a letter from AT&T acknowledging SWBT's response to AT&T's request and informing SWBT that

¹⁰⁹ See Transmittal No. 2633, Proposed Section 29.1-29.2.

¹¹⁰ Indeed, the Coastal competitive bid request specifically contemplates such extended negotiations.

¹¹¹ Transmittal No. 2633, Proposed Section 29.1-29.2.

¹¹² D&J at Attachments 3-4.

¹¹³ D&J at 11 n.16.

¹¹⁴ SWBT Direct Case at Exhibit A. SWBT also states that American Communications Service, Inc. and MCImetro Access Transmission Services, Inc. operate in Dallas and Houston. See D&J at 7-8.

AT&T had decided to "pursue other options;" and (6) an assertion that SWBT has lost 43 percent of its share of the high capacity market in Dallas, and 38 percent in Houston.¹¹⁵

47. We agree with MCI, AT&T, and others that SWBT's evidence of competition is inadequate to demonstrate that sufficient competition exists in Dallas and Houston to justify the grant of the additional pricing flexibility that would be permitted under Transmittal No. 2633 to SWBT in those cities, much less throughout SWBT's serving area. The existence of only two RFPs and their informal nature also adds credence to the opponents' view that the requests for competitive bids may have been issued solely to gauge the extent of competition in the relevant markets. SWBT's customer anecdotes, taken from a 1993 report which SWBT did not submit into the record of this proceeding, and the MFS and Time Warner tariff pages and brochures¹¹⁶ are similarly unprobative.

48. SWBT's additional evidence is no more persuasive. With respect to SWBT's market share loss data, we note that in this proceeding SWBT failed either to submit its consultant's report asserting the market share losses, or to identify the docket number where this information could be found. SWBT's assertions in this record also are limited to special access services in Dallas and Houston. Yet nothing in Transmittal No. 2633 would limit SWBT from responding to competitor efforts to enter the switched access market as opposed to the special access market or from offering customer-specific RFP bids anywhere in SWBT territory.¹¹⁷ SWBT's showing of competition is no more persuasive than the anecdotal evidence we rejected in the *DS-3 ICB Order*.¹¹⁸

49. Non-availability of Competitive Necessity Doctrine. Based on this record, we find significant potential that SWBT, by offering customer-specific discounts under Transmittal 2633, may be able unreasonably to foreclose or deter entry into its markets. To enter the access market successfully, a new entrant must be able to attract a sufficient amount of business to achieve significant economies of scale. New entrants must make large up-front investments before they can begin offering service. For example, a new entrant planning to

¹¹⁵ SWBT Direct Case at 8, n.15.

¹¹⁶ SWBT Exhibit A, MFS tariff at 3.3.2; Time Warner tariff at 8.8.1. We note that, unlike SWBT's tariff, which limits availability to customers "requesting the same service in the same quantities and at the same central office(s)," see Transmittal No. 2633, Section 29.2., the MFS and Time Warner tariffs do not contain geographic restrictions on availability. MFS's tariff provides that rates and terms may be subject to, among other things, "availability of existing MFS facilities." SWBT Exhibit A, MFS tariff at 3.3.2. Inasmuch as MFS, unlike SWBT, lacks ubiquitous facilities, we find MFS' condition to be a reasonable one.

¹¹⁷ Transmittal No. 2633, Proposed Section 29.3.4 (providing that facilities may be used for switched or special access).

¹¹⁸ See *DS-3 ICB Order*, *supra*.